# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 962

SOUTH BAY DAILY BREEZE, A DIVISION OF SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–14a) is reported at 415 F. 2d 360. The Board's decision and order (Pet. App. 19a–61a) are reported at 160 NLRB 1850.

### JURISDICTION

The judgment of the court of appeals was entered on August 1, 1969, and a timely petition for rehearing was denied on September 19, 1969. The petition for a writ of certiorari was filed on December 18,



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1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, in an unfair labor practice proceding, the National Labor Relations Board is precluded by the Fourth Amendment from considering a document which was taken without permission by an employee from his employer, where the Board's General Counsel, who offered the document in evidence, had no prior knowledge of the unauthorized taking.

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment to the Constitution of the United States and the relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix to the petition (Pet. App. 62a–66a).

## STATEMENT

Petitioner Company publishes a daily newspaper, the South Bay Daily Breeze, in Torrance, California. In April 1965, Loel Schrader, an international representative of the Los Angeles Newspaper Guild, commenced an organizational campaign with the assistance of three of the Company's editorial employees (Pet. App. 22a; Tr. 44, 46.)[1] Within a few days, 15 of the Company's 25 editorial employees had signed

[1] References to the stenographic transcript of the testimony before the Board are designated "Tr." References designated "G.C. Exh." or "Co. Exh." are to the exhibits of the General Counsel and the Company which were introduced at the Board hearing.

authorization cards and Schrader requested the Company to recognize the Guild as bargaining agent (Pet. App. 23a; Tr. 26, 52–54; G.C. Exh. 1(d), 7). The Company refused to accede to the request (Co. Exh. 12). On July 20, 1965, a Board representation election was held, which resulted in a tie vote (Pet. App. 25a; G.C. Exh. 1(p)). Shortly thereafter, the Guild filed objections to the election (G.C. Exh. 1(h)) and charges alleging that the Company had engaged in conduct violative of Section 8(a)(1) and (5) of the Act in connection therewith (G.C. Exh. 1(j)). The two cases were consolidated for hearing before a trial examiner of the Board (Pet. App. 21a; G.C. Exh. 1(r)).

The Board, adopting the decision of its trial examiner, found that the Company had violated Section 8(a)(1) of the Act by interrogating employees about their union activities; by threatening them with discharge, blacklisting, and lack of opportunity for promotion to managerial positions because of those activities; by promising wage increases and other benefits, and granting wage increases, to discourage union activities; by soliciting an employee not to attend a union meeting; by giving employees the impression of surveillance of their union activities; and by threatening employees with a stringent and heartless application of work rules if the Guild won the election (Pet. App. 55a). The Board also found that the Guild had valid authorization cards from a majority of the unit employees, that the Company's denial of recognition was in bad faith, and that the Company thus had vio-

lated Section 8(a)(5) by refusing to bargain with the Guild and by unilaterally granting wage increases to employees (Pet. App. 49a–54a, 56a).

The Board ordered the Company to cease and desist from the unfair labor practices found and from interfering in any other manner with the employees' rights under the Act. The Board also ordered the Company to bargain, upon request, with the Guild and to post appropriate notices (Pet. App. 56a–61a). Finally, the Board set the election aside (Pet. App. 55a–56a). The court of appeals (with District Judge Byrne dissenting in part)[2] sustained the Board's findings and conclusions and enforced its order (Pet. App. 1a–14a).

In finding that the Company violated the Act, the trial examiner relied in part (Pet. App. 29a, n. 3, 30a, n. 4, 38a, 53a–54a) on a memorandum prepared during the campaign by the Company news editor, Kenneth Johnson, for use by the publisher and other supervisory personnel. The memorandum contained a list of employees with the editor's evaluation of their stands on the Guild and suggestions of ways to win over Guild adherents (Pet. App. 29a, n. 3; G.C. Exh. 18). The only issue raised by the instant petition concerns the propriety of introducing and considering this memorandum, consistent with the Fourth Amendment, in an unfair labor practice proceeding before the Board. The facts relating to the memorandum are as follows:

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[2] Judge Byrne would not have enforced the bargaining order because, in his view, misrepresentations occurred in the solicitation of the authorization cards (Pet. App. 14a–18a).

The memorandum was offered into evidence by counsel for the Board's General Counsel, in the course of the testimony of Gary Gillis, a former employee who had been an active Guild adherent (Tr. 89–90). Thereafter, under questioning by Company counsel, Gillis admitted that it was a copy of a document which he had taken from City Editor J. Berman's desk drawer without the latter's knowledge or permission, and which he had then turned over to Guild Representative Schrader (Tr. 93–94). Gillis further testified that he copied the document early in the organizational campaign, that he gave it to Schrader a couple of weeks later, and that he had no intention of giving it to a Board agent and had never discussed his action with such agent (Tr. 98–100). The trial examiner overruled the Company's objection to receipt in evidence of the memorandum, on the ground that the Board permits use of "documents allegedly purloined unless it is established that an agent of the government has been a party to its unlawful seizure" (Tr. 151).[3] The court of appeals sustained that ruling on the authority of *Burdeau* v. *McDowell*, 256 U.S. 465 (Pet. App. 4a–5a).

## ARGUMENT

The sole question presented here is whether the Board properly declined to exclude a document which had been turned over to a Board agent by the charg-

[3] See *Andrew Jergens Co.*, 27 NLRB 521, 524–525; *Air Line Pilots Ass'n*, 97 NLRB 929, n. 1; *General Engineering, Inc.*, 123 NLRB 586, n. 2.

ing party in circumstances where neither the Board agent, nor even the charging party,[4] knew that an employee union adherent had taken the document without permission from his superior's desk drawer. This issue does not warrant further review, for this Court long ago held that the Fourth Amendment does not bar use by the government, even in a criminal proceeding, of documents obtained unlawfully by private individuals without complicity by governmental agents, since, in that situation, there has been no unlawful search or seizure by the government itself. *Burdeau* v. *McDowell,* 256 U.S. 465. More recently, the Court reaffirmed that the Fourth Amendment only gives "security * * * [from] unwarranted *governmental* intrusion." *Hoffa* v. *United States,* 385 U.S. 293, 301 (emphasis added).

Contrary to petitioner's contention, *Elkins* v. *United States,* 364 U.S. 206, has not undermined *Burdeau.* The issue in *Elkins* was whether evidence which had been illegally seized by State officers and turned over to federal officers could be used by the latter in a federal criminal proceeding. The Court, in the exercise of its supervisory power over the ad-

[4] Petitioner's statement that the evidence was "obtained through theft by the charging party" (Pet. 2–11, n. 14) is in error. The charging party is the Guild and there is no basis for concluding that Gillis, the employee who took the document, acted as an agent of the Guild in doing so. There is no evidence that International Representative Schrader was in any way implicated in the theft, or, in fact, knew how Gillis had obtained the document. Moreover, Gillis obtained the document early in the campaign, before charges with the Board had even been filed by the Union (*supra,* p. 5).

ministration of criminal justice in the federal courts, barred the use of such evidence by the federal officers in order to protect the "[f]ree and open cooperation between state and federal law enforcement officers" against "subterfuge and evasion" (364 U.S. at 221–222). Nothing in this rationale warrants extending *Elkins* to the acts of private individuals; indeed, *Burdeau* was not even cited in *Elkins*. Moreover, since *Elkins* the lower courts have consistently continued to follow the rule of *Burdeau* where, as here, unlawfully obtained evidence has been turned over to a government official by a private party who acted independently and without the knowledge of the government. See *United States* v. *McGuire*, 381 F. 2d 306, 313, n. 5 (C.A. 2), certiorari denied, 389 U.S. 1053; *United States* v. *Goldberg*, 330 F. 2d 30, 35 (C.A. 3), certiorari denied, 377 U.S. 953; *United States* v. *American Radiator & Standard Sanitary Corp.*, 278 F. Supp. 241, 249–252 (W.D. Pa.).

Notwithstanding petitioner's repeated claim in this regard, the holding in *Knoll Associates* v. *Federal Trade Commission*, 397 F. 2d 530 (C.A. 7) (Pet. App. 67a–82a) is not in conflict with the decision below. In *Knoll*, unlike here, the record showed that Prosser, the disloyal employee, not only stole the documents for specific use in an ongoing Commission proceeding against the employer, but had discussed the documents in telephone conversations with Commission attorney Turiel well before they were introduced in evidence at the hearing (Pet. App. 72a, 79a, n. 5). As the Seventh Circuit found, "those who represented

the Commission knew that Prosser had stolen from the office of Dworski, a sales representative of Knoll, various documents, which he turned over to representatives of the Commission for use in this proceeding, and that they were so used" (Pet. App. 81a). These circumstances established a critical link between the individual and the government which was absent both in *Burdeau* (see Pet. App. 79a, n. 5) and here.[5]

Petitioner's fear (Pet. 14) that the holding below "provides inducement to the Government to encourage illegal private action and to barter with thieves for the fruit of their crimes" ignores the fact that, in this case, the Board agent did not know the document was stolen when he received it (see Pet. 14, n. 18). In fact, so far as the record shows, even the Guild did not know the document was stolen when employee Gillis gave it to International Representative Schrader. And, as the court below added, "Nor are employers or employees 'free' to steal documents; civil and criminal remedies are readily available to deal with such conduct, and we have been provided with no persuasive evidence that those remedies are or will be ineffective" (Pet. App. 7a).

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[5] Petitioner also contends (Pet. 5–8) that *Knoll* conflicts with the instant case on the issue of whether the Fourth Amendment exclusionary rule applies to cease and desist proceedings before federal administrative agencies. While the court below indicated that it did not believe that the rule was applicable to such proceedings (Pet. App. 6a), its view on this issue is dictum since it did rest its holding on "the *Burdeau* mandate" (*ibid.*).

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970